IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-21

SOCIALIST LABOR PARTY, *et al.*,

Appellants,

—v.—

JOHN J. GILLIGAN, GOVERNOR, STATE OF OHIO, *et al.*,

Appellees.

No. 70-56

HELEN A. SWEETENHAM, *et al.*,

Appellants,

—v.—

JOHN J. GILLIGAN, GOVERNOR, STATE OF OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

BRIEF OF APPELLANTS

Jurisdiction

These cases, brought for declaratory and injunctive relief, involve questions of the constitutionality of certain election laws of the State of Ohio. In the *Socialist Labor Party* case, hereinafter also called the *political party case,*

the jurisdiction of the District Court was invoked under 42 U.S.C. Sections 1981, 1983 and 1988; 28 U.S.C. Section 1343 (3) and (4); 28 U.S.C. Sections 2201 and 2202; and the First and Fourteenth Amendments of the Constitution of the United States. In the *Sweetenham* case, hereinafter also called the *independent candidates case,* the jurisdiction of the District Court was invoked under 42 U.S.C. Section 1983; 28 U.S.C. Section 1343 (3) and (4); 28 U.S.C. Section 2201; and the following provisions of the Constitution of the United States: Article I, Section 2; Article IV, Sections 2 and 4; and the First, Ninth and Fourteenth Amendments.

The order of the District Court in these cases was filed on July 29, 1970 and amended on July 31, 1970. Cross-appeals were filed by the plaintiffs and the defendants in both cases from the District Court order granting some and denying some of the relief requested. The Board of Elections of Cuyahoga County, Ohio, which was named a party-defendant in *Sweetenham,* the *independent candidates case,* and which participated in the District Court proceedings, did not file a notice of appeal. Subsequent to the filing of notices of appeal, the defendant John Gilligan, Governor of the State of Ohio, was substituted for James A. Rhodes, and William J. Brown, Attorney General of Ohio, was substituted for Paul W. Brown.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1253. This Court's jurisdiction is sustained by *Williams* v. *Rhodes,* 393 U.S. 23.

Opinions Below

The opinion and order of the District Court in both of these cases are reported at 318 F. Supp. 1262 (S.D. Ohio 1970) and are included in the Appendix at pp. 46-69. The Amended Order of the District Court may be found in the Appendix at pp. 70-71.

Statutes Involved

The numerous provisions of the Ohio election laws involved in this appeal are set forth in the brief of the defendants at 3-26.

Questions Presented

1. Is the inter-connected totality of Ohio election laws, disapproved in *Williams* v. *Rhodes* and with minor modifications again before the Court, unconstitutional?

2. Are the various Ohio statutes dictating party organization unconstitutional?

3. Does the Ohio political party test oath requirement, broadly, vaguely, without due process and unequally, abridge the right to free speech and political association?

4. Is the Ohio statute which prescribes a seven percent signature requirement for new and small party inclusion on the ballot unconstitutional?

5. Is the Ohio statute which prescribes a four per cent signature requirement for independent party inclusion on the ballot unconstitutional?

6. Is the Ohio statute which requires an independent candidate for state-wide office to file petitions containing signatures of two hundred electors from each of thirty counties, and providing that no more than one-fourth of the total signatures required to be obtained by an independent candidate be obtained from any one county, unconstitutional?

Statement of the Cases

On January 28, 1970, these two actions were filed in the United States District Court for the Southern District of Ohio challenging various Ohio election laws. Both cases sought declaratory and injunctive relief against further enforcement of the challenged statutes, and particularly injunctive relief against enforcement of the statutes so as to deny access to the ballot. In No. 70-21, the complainants were the Socialist Labor Party, its Ohio State Committee, and one of its officers. In No. 70-56, the complainants were an independent candidate for governor, an independent candidate for United States Representative, and a voter.

On July 16, 1970, a three-judge court heard these cases, which were consolidated. On July 29, 1970, the court issued an order which, as thereafter amended to correct a clerical error, permanently enjoined the defendant state officials from enforcing those portions of the various statutes challenged which were held unconstitutional. The court further ordered that the candidates of the Socialist Labor Party for governor and for United States Senator be placed on the ballot for the November, 1970 general election, accompanied by the name of the Socialist Labor Party.

The district court invalidated provisions of the Ohio election laws. The following statutes or portions thereof were held unconstitutional: §3517.01 as amended (7% requirement for political party ballot status); §3505 as amended, and §3513.12 as amended (requiring national party conventions for party candidates for presidential nomination); §3513.11 (requiring state conventions and state-wide party organization); §§3517.02, 3517.03, and 3517.04 (specifying the organizational structure of a party); §3513.257 and §3513.258 (4% requirement for independent candidate ballot status); and §3513.258 (requiring that an independent candidate for state-wide office file petitions containing signatures for at least 200 hundred electors from each of thirty counties, and that no more than one-fourth of the total signatures required be obtained from any one county).

Cross-appeals were filed in both cases. The defendants appealed from the voiding of Ohio election laws. The plaintiffs in the Socialist Labor Party case (No. 70-21) appealed from the decision below upholding, as construed, the constitutionality of the political party loyalty oath requirement (§3517.07). The defendants have also appealed from that ruling to the extent that it impugned the facial constitutionality of the loyalty oath requirement. The plaintiffs in the independent candidates case (Oct. 1970 No. 790) appealed the decision below upholding the validity of Ohio's early requirement for filing independent candidate petitions ninety days "before the first Tuesday after the first Monday in May immediately preceding such general election" (§§3513.257 and 3513.258).

On March 29, 1971, the Court noted probable jurisdiction in No. 70-56, in which the state appealed from the

rulings against it in both cases. Probable jurisdiction was also noted in No. 70-21, in which the Socialist Labor Party appealed from the decision below upholding the constitutionality of the loyalty oath for political parties. No action has been taken by the Court on the appeal in No. 70-15, in which the plaintiffs in the independent candidate case appealed from the decision upholding the validity of Ohio's early deadline requirements.

Summary of Argument

In *Williams* v. *Rhodes,* 393 U.S. 23, 34, this Court ruled the "the totality of the Ohio restrictive [election] laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination in violation of the Equal Protection Clause.". See *Jenness* v. *Fortson,* 29 L.Ed.2d 554, 560. Despite minor cosmetic modifications, the "entangling web of election laws" remains virtually unchanged. In order to dispel the restrictive cloud over the Ohio election processes, and to eliminate present and future effects of past discrimination, a prophylactic remedy is required. The defendants should be barred from enforcing the election laws before the Court. They should be instructed to go to the Ohio legislature for an entirely new election code.

The various Ohio statutes which govern party organization and nomination processes were before this Court in *Williams* v. *Rhodes.* These provisions are ripe for final adjudication. The decision of the court below should be affirmed as to these laws on the ground that they clearly violate the freedom of political association and deny the equal protection of the laws. Further, the court below should be affirmed on the grounds of *res judicata.*

Section 3517.07 of the Ohio election law conditions political party access to the ballot on the execution of a test oath. This provision is unduly broad in derogation of the First Amendment. It is also unduly vague and uncertain in violation of the Due Process Clause. Further, it does not provide for procedural due process of law and illegally places the burden of proving loyalty on the political party. Finally it unequally, and without cause, exempts the Democratic and Republican Parties from the test oath requirement.

After the decision in *Williams* v. *Rhodes*, the Ohio legislature reduced from 15 to 7 per cent the petition requirement for new or small political parties to be included on the ballot. At the same time, the petition requirement for independent candidates was reduced from 7 to 4 per cent. These reductions are unavailing. The Ohio requirement does not become insulated by this Court's decision in *Jenness* v. *Fortson*, 29 L.Ed.2d 554. Unlike the Georgia law validated in *Jenness*, Ohio's petition requirements must still be evaluated within the "totality" or "entangling web of election laws" already disapproved by this Court in *Williams* v. *Rhodes*, 393 U.S. at 34.

The requirements of Section 3513.258, that an independent candidate for state-wide office file petitions containing signatures of 200 electors from each of thirty counties and that no more than one-fourth of the total signatures required to be obtained by an independent candidate come from any one county, deny equal protection of the laws. *Moore* v. *Ogilvie*, 394 U.S. 814.

ARGUMENT

I.

The Ohio election laws now before the Court were properly declared unconstitutional and enjoined as an inter-connected "totality" which perpetuates the unlawful "burden on voting and associational rights" disapproved by this Court in *Williams* v. *Rhodes*.

Williams v. *Rhodes*

Several of the provisions of Ohio law challenged here in No. 70-21 were also before the Court three years ago in *Williams* v. *Rhodes*, 393 U.S. 23.[1] In that case, the Court said: "The State of Ohio in a series of election laws has made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old political party, which has a very small number of members, to be placed on the state ballot . . . " 393 U.S. at 24. Considering all the provisions together, the Court held that, "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." 393 U.S. at 34. Mr. Justice Douglas, and Mr. Justice Harlan, in separate concurring opinions, expressed their view that Ohio's election laws were an unconstitutional infringement upon freedom of association. 393 U.S. at 35, 41.

The majority and concurring views were not inconsistent. As Justice Black observed for the Court, the overall effect

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[1] The following Ohio statutes, challenged in No. 70-21, were also expressly treated in the opinion of the Court in *Williams* v. *Rhodes*: §§3517.01, 3517.02, 3517.03, 3517.04, 3505.10. Mr. Justice Douglas, concurring, cited in addition the following provisions, which are again before the Court: §§3513.11, 3515.12.

of the Ohio election laws was to "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms." *Williams* v. *Rhodes,* 393 U.S. at 30. Under both the equal protection and freedom of association approaches, the State of Ohio did not prevail because it could not demonstrate any compelling state interest to justify its egregious invasion of voting and associational rights, especially in view of the availability of less drastic means to secure any legitimate state interests. *Williams* v. *Rhodes,* 393 U.S. at 31; see, e.g., *Phoenix* v. *Kolodziejsky,* 399 U.S. 204, 209; *Evans* v. *Cornman,* 398 U.S. 419, 422; *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670; *Reynolds* v. *Sims,* 377 U.S. 533, 561-62; *Schneider* v. *Smith,* 390 U.S. 17, 24; *United States* v. *Robel,* 389 U.S. 258, 268; *NAACP* v. *Alabama,* 377 U.S. 288, 307-08; *NAACP* v. *Button,* 371 U.S. 415, 438; *Shelton* v. *Tucker,* 364 U.S. 479, 488.

Ohio has not complied with the rulings in *Williams* v. *Rhodes.* Instead of performing the major operation which is necessary to neutralize the unconstitutional "totality," the Ohio legislature made only minor cosmetic modifications in the election laws. Having retained the overall restrictive statutory scheme, the defendants nevertheless contend that a new statutory scheme is before the Court, and therefore *Williams* v. *Rhodes* does not control. Further, the defendants have manifested that unless this Court grants prophylactic relief, they will continue to frustrate the mandate of *Williams* v. *Rhodes.* In their brief in the present cases, the defendants assert that Ohio's election

laws "are presently in the process of being amended further" (Brief for Rhodes, *et al.*, p. 36). (Whether these alleged amendments will relieve the statutory scheme of its constitutional infirmities is left open to speculation.) In addition, at this late date, the defendants have come forward with some novel statutory interpretations, and can be expected to improve upon these until this Court makes it crystal clear that *Williams* v. *Rhodes* requires a complete fracture from past law and practice in Ohio.

The present lawsuits were necessary because the changes in Ohio election laws since *Williams* v. *Rhodes* were utterly insubstantial, thereby continuing in the present the discriminatory effect of the past unconstitutional practices. Indeed, intervention by a federal judiciary was necessary (for a second time in two years), to assure the Socialist Labor Party—plaintiff after all in *Williams* v. *Rhodes*—effective participation in the November, 1970 general election in Ohio.

Recent Modification of Ohio Election Law

The following changes were made in the Ohio election laws after the decision in *Williams* v. *Rhodes*. First, write-in candidates are now allowed under Ohio law (§§3505.03, 3505.10, 3513.041, 3513.10). However, the voter's privilege to write-in candidates is not untrammeled. For his votes to be counted, a write-in candidate must formally declare his "intent to be a write-in candidate" at least twenty days preceding the election, and he must pay a filing fee (§§3513.041, 3513.10).

Second, candidates and voters are no longer barred from changing party affiliation, for purposes of participating in primaries, from one election to another—so long as

they change affiliation to a newly organized political party (§§3517.013, 3517.016).

Third, in order to be included on the printed ballot, independent candidates now must submit nominating petitions containing the signatures of 4, rather than 7, per cent of the voters in the last gubernatorial or presidential election. However, they remain subject to a stringent early deadline requirement (§§3515.252, 3512.256, 3513.257, 3513.258).

Fourth, independent candidates may now be presented for the offices of President and Vice-President of the United States (§3513.258). In the past, independent candidates could be offered for many other offices, but not for the above two.

The final change concerns formal recognition as a political party. Now any group of voters whose candidate received less than seven, rather than less than ten, per cent of the vote at the last gubernatorial or presidential election, and which desires recognition as a political party, must file petitions with a number of signatures equal to seven per cent of the votes cast in the last election for governor or president, not merely for governor (§3517.01). Although this modification has reduced the signature requirement from the fifteen percent required at the time of *Williams* v. *Rhodes,* Ohio's political party signature requirement continues to be the largest in the country. See *Williams* v. *Rhodes,* 393 U.S. 23, 47 n. 10 (Harlan, J. concurring); Record in No. 70-21, Appendix D to Memorandum in Support of Plaintiffs' Motion for Summary Judgment. In addition, the filing deadline for the petition has been increased from "ninety days before an election" to one hundred and twenty days before the next primary election.

Timely filing of a petition containing the requisite number of signatures is not itself sufficient to enable a new or small party to place its candidates on the ballot. A second requirement, unchanged since *Wilkams* v. *Rhodes*, compels a political party to hold a primary (§§3513.01, 3517.01). And there are several statutes governing party organization which must be complied with. The party must elect a central committee composed of two members from each congressional district, elect a county central committee for each county (§§3517.02, 3517.03, 3517.04),[2] and elect delegates and alternates to a national convention (§3513.12). Further, each political party must hold a state convention composed of, in addition to candidates, 500 delegates (§3513.11). Finally every party, not on the ballot in each national and gubernatorial election since 1900, must execute a political test oath which clearly violates the constitutional protections of free speech and due process of law (§3517.07).

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[2] In their brief, for the first time the defendants contend that these provisions come into play only *if* a party voluntarily decides to have a controlling committee. Brief at 40-41. If the defendants are correct, the direct burden of these particular provisions does not fall upon the plaintiffs. But this novel construction of the statute is contrary to the findings of fact below, and contrary to the findings of this Court in *Williams*. Further, the defendants point to no state court decision so interpreting these provisions. Indeed, the highest court of Ohio has treated similar election laws as mandatory. *State ex rel. Beck* v. *Hummel*, 150 Ohio St. 127, 80 N.E.2d 899 (1948). Further, under Ohio law, the state attorney general can make no binding construction of statutes. *Anderson* v. *Wolf*, 17 O.L.A. 161 (Ohio App. 1934). Cf. *Whitehill* v. *Elkins*, 389 U.S. 54. Where critical First and Fourteenth Amendment rights are at stake, individuals and political parties cannot be made to rely on the sufferance of government officials, whose tenure is not certain and whose construction of statutes is not immutable. See, e.g., *Baggett* v. *Bullitt*, 377 U.S. 360.

Recent Modifications Have Not Changed the Unconstitutional "Totality" of the Ohio Election Law

When considered separately, numerous of the provisions of the Ohio election laws again before the Court suffer quite specific constitutional defects. These will be elaborated *seriatim* in the subsequent points of argument presented in this brief. Suffice it to say, for the present, these individual defects rendered the "totality", so resoundingly scored in *Williams* v. *Rhodes*, all the more tainted. Indeed, as will appear subsequently, it is singularly difficult to evaluate the constitutional defects of the separate provisions in isolation from the whole. As this Court characterized them in *Williams* v. *Rhodes*, Ohio's election laws are "an entangling web." 393 U.S. at 34. And, distinguishing the Ohio and Georgia election laws in *Jenness* v. *Fortson*, 29 L.Ed.2d 554, 560, Mr. Justice Stewart observed for a unanimous Court that:

> The Court's decision with respect to this 'entangling web of election laws' was unambiguous and positive. It held that 'the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause.' 393 U.S. at 34.

The "totality" of Ohio election laws is virtually unchanged. (For the elaboration of distinguishing details, most of which remain in the Ohio scheme, deemed persuasive in the differentiation made in the *Jenness* case, see 29 L.Ed.2d at 558-60.) Regardless of the changes in some details, the deleterious effects of Ohio's "entangling web of election laws" have not been dissipated by the few changes.

Nor could they be. The purpose of these laws was to foreclose minor parties and independent candidates in Ohio. E.g., *Williams* v. *Rhodes,* 393 U.S. at 31-32; *id.* at 47 n. 9 (Harlan, J. concurring).

For nearly two decades, these laws, more limiting than others observed in the history of our nation (see *Williams* v. *Rhodes, supra; Jenness* v. *Fortson, supra*), have controlled all access to Ohio elections. From the enactment of these laws, following the 1948 presidential election (*Williams* v. *Rhodes,* 393 U.S. at 47 n. 9 (Harlan, J. concurring)), until the 1968 presidential election, Ohio has had neither third party candidates nor independent candidates on the ballot. Furthermore, write-ins were not permitted.

Obviously, the political climate fostered by Ohio's restrictive elections laws was stultifying to the development of new or small political parties, and of independent candidacies. The political climate of Ohio was not free, and it remains unfree. The people, deprived for so long of the Georgia example of successful independent and third party candidates, see *Jenness* v. *Fortson,* 29 L.Ed.2d at 561-62, cannot be expected to accept readily third party or independent candidates.

Those third parties that have had the fortitude to survive the long drought, such as the Socialist Labor Party, have virtually withered. By 1968, the Socialist Labor Party had only 105 members. Although it had continued to attempt to participate in Ohio political processes, its efforts have been severely hampered because the futility of gaining the ballot made recruitment of supporters more difficult. In other words, a downward spiral has emaciated the Party. Independent candidates are in the same position.

The Ohio legislative response to this Court's decision in *Williams* v. *Rhodes* has not purged the restrictive political atmosphere of the state. The election processes have not been unfettered. A sharp and abrupt departure from past practice and law is necessary to free Ohio voters, political parties, and independent candidates from the continuing unconstitutional effects of the post-1948 laws and practices. In their "totality", the Ohio election laws now before the Court must be struck down; the defendants must be constrained to go to the Ohio legislature for a completely new election code.

There Must Be a Complete Fracture, Displacing Ohio's Old Election Law to Enforce This Court's Judgment in Williams v. Rhodes

The remedy plaintiffs request is supported by numerous decisions in analogous fields. Especially in cases involving denial of the equal protection of the laws, this Court has frequently required relief designed to eliminate not merely present overt discrimination, but also the present and future effects of past discriminatory practices.

Louisiana v. *United States*, 380 U.S. 145 was a voting rights case. Over a period of time, the percentage of registered voters who were black dropped from 44% to less than 1%, and later rose to only 15%. 380 U.S. at 147-49. A central issue in the case was the remedy. The district court concluded that it was insufficient merely to enjoin unfair application of the so-called "interpretation test" which was a key tool in the state's discrimination. 380 U.S. at 150 n. 9. Consequently, the district court enjoined all future use of this test, and also enjoined use of a newly enacted, different type of test, unless all voters were first put to the new test. 380 U.S. at 150-51. This Court affirmed, observing that: "We must bear in mind that the court has not merely

the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as ban like discrimination in the future." 380 U.S. at 154.

Ohio's attempt to comply as little as possible with this Court's decision in *Williams* v. *Rhodes* should be treated in the same fashion. The relevant Ohio election laws should be struck down as a "totality", and access to the ballot should be declared completely open until such time as the Ohio legislature adopts new elections laws which do not perpetuate in the present and the future the effects of past discrimination and inhibition and which apply equally to all political parties and candidates. See e.g., *United States* v. *Duke*, 332 F.2d 759 (5th Cir. 1964) (so-called freezing principle applied to eliminate racial discrimination in access to the vote). See also, *Gaston County* v. *United States*, 395 U.S. 285, where this Court sustained a district court refusal, under the Voting Rights Act of 1965, to reinstate a literacy test. The Court ruled that even though the county had made "significant strides toward equalizing and integrating its school system," past discriminations made impartial administration of literacy test insufficient to protect the rights of black voters. 395 U.S. at 296-97.

The Court has applied the same principle to remedy racial discrimination in education. A decade and a half after *Brown* v. *Board of Education*, 347 U.S. 483; 349 U.S. 225, this Court declared:

> Brown II was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School Boards such as the respondent

> were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. *Green* v. *School Board of New Kent County*, 391 U.S. 430, 437-38.

Thus it became clear that affirmative steps were to be taken not merely to eliminate active discrimination in the present and future; affirmative steps were also required to eliminate the present and future effects of past discrimination.

In *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, the Court approved a decree setting mathematical ratios of white to black teachers, and mandating other affirmative remedies to ameliorate the present and future effects of past discrimination, much of which occurred after the rulings in *Brown* v. *Board of Education*. During the Court's last term, this principle was applied to pupil busing decrees designed to assure racial balance within the public schools' populations. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 28 L.Ed.2d 554; *Davis* v. *Board of School Commissioners of Mobile County*, 28 L.Ed.2d 577. And the same principle has been applied, under Title VII of the Civil Rights Act of 1964, to invalidate and then completely re-order job seniority systems which tended to perpetuate past racial discrimination in employment. E.g., *Taylor* v. *Armco Steel Corp.*, 429 F.2d 498 (5th Cir. 1970); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980 (5th Cir. 1969); *Norman* v. *Missouri Pacific Railroad*, 414 F.2d 73 (8th Cir. 1969); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). See *Griggs* v. *Duke Power Co.*, 28 L.Ed.2d 158.

The case of *NLRB* v. *Tappan Stove Co.*, 174 F.2d 1007 (6th Cir. 1949) illustrates application of the principle in another context. A company union, legal prior to passage of the National Labor Relations Act, was succeeded after passage of the Act by an organization no longer in fact company dominated. The Labor Board, affirmed by the court, found that the efforts to disestablish the company union were unavailing:

> In a situation of this type, our first inquiry is whether or not the labor organization which purports to act as the employees' bargaining agent is a successor to or a continuation of the labor organization dominated and assisted by the employer. For the effect of an employer's coercion inherent in the maintenance of a dominated union ordinarily survives the illegal organization. To dispel this coercive effect, if a succeeding organization is set up, there must be a complete break or fracture between the two organizations. 174 F.2d at 1012-13; accord, *NLRB* v. *Southern Bell Telephone & Telegraph Co.*, 319 U.S. 50.

The Labor Board and the court found the break between the two organizations insufficient, and the company was enjoined from recognizing the successor organization, or any successor thereto.

There has been no adequate "break or fracture" between the election laws declared unconstitutional by this Court in *Williams* v. *Rhodes* and the laws now before this Court. They all should be declared unconstitutional and their enforcement should be enjoined.

II.

The various statutes dictating party organization are unconstitutional under the Equal Protection Clause and also under the First Amendment.

A group of the Ohio statutes challenged in No. 70-21 minutely regulates the organization of a political party, and requires a party to hold national and state conventions. All but one of these laws were part of the "entangling web of election laws" before the Court in *Williams* v. *Rhodes,* 393 U.S. at 34. "Indeed, a large reason for the Court's invalidation of the Ohio election laws in *Williams* v. *Ohio, supra,* was precisely that Ohio *did* impose just such requirements on small and new political organizations." *Jenness* v. *Fortson,* 29 L.Ed.2d at 562. Most of these requirements remained unamended, or if amended, the amendments do not cure the defects.

Collectively and singly, the Ohio party organization requirements continue to be a straitjacket which forces political parties to conform, without justification, to a single model. They penalize political parties for being small, non-national, new and innovative. They deny such political parties, their members, and sympathetic voters important First and Fourteenth Amendment rights. As observed by the Court in *Jenness,* "sometimes the grossest discrimination can be in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams* v. *Rhodes, supra.*" 29 L.Ed.2d 562.

A. Sections 3505.10 and 3513.12, which require that a political party hold a national convention, composed of delegates and alternates elected at a primary, and nominate candidates for President and Vice-President of the United States, are unconstitutional.

Sections 3505.10 and 3513.12 require a political party to hold a national convention. The delegates and alternates to the convention must be elected at a party primary. At this national convention, the party must nominate candidates for President and Vice-President of the United States.

The defendants, for the first time, now assert that §3513.12 is "optional." Brief at 40-42. If they are correct, the plaintiffs are relieved of these particular burdens. But the defendants' assertion is unavailing. The defendants are powerless to make binding constructions of the Ohio statutes, and the plaintiffs cannot be made to rely upon the defendants' constructions, to the peril of their First and Fourteenth Amendment rights. Further, on its face the statutes are, and they have heretofore been treated as, mandatory.[3] The Complaint in No. 70-21 clearly alleged that both sections were mandatory,[4] and these allegations were admitted in the defendants' answer.[5]

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[3] See note 2, *supra*, p. 12.

[4] The complaint alleged in paragraph 14(b) that "Delegates and alternates must be elected at the primary to a national convention, Section 3505.10, Ohio Revised Code." In paragraph 15, the complaint alleged, "Plaintiffs say that section 3513.12, Ohio Revised Code, . . . requires a political party to run a candidate for president of the United States; that it requires an Ohio political party to hold a national convention . . . " (App. 10-11).

[5] The defendants admitted the "provisions of statutes enumerated in subparagraphs (a) through (c) of paragraph 14." The defendants also admitted the allegation of paragraph 15, except for the conclusion that Section 3513.12 is "an unwarranted and unnecessary intrusion into the internal affairs of political parties" (App. 18).

These requirements violate the Equal Protection clause. These statutes discriminate against new and small parties by permitting only national parties to appear on state election ballots. The effect of this discrimination is severe; non-national parties are denied access to the ballot; new or small parties are unduly discouraged; parties which seek more flexible structure or even more democratic or participatory alternatives in the nomination process are in effect outlawed. These requirements also infringe upon freedom of association by limiting the kinds of political groups which may participate effectively—*i.e.*, as political parties—in Ohio elections.

The burdens and discrimination imposed by these requirements cannot be justified by any compelling state interest. Indeed, the defendants do not even attempt to suggest that any substantial state interest supports these requirements. (It is obvious that the state's only interest is an unconstitutional one—to preserve the electoral monopoly of the traditional two national parties. See, e.g., *Williams* v. *Rhodes*, 393 U.S. 31-32; *id.* at 43 n. 9 (Harlan, J. concurring).) Instead, the defendants contend that these requirements are not, in fact, burdensome.

Obviously, however, they are quite burdensome. Local parties, small parties, and parties which have no desire to submit presidential and vice-presidential candidates in a given year, in effect are outlawed from Ohio elections. The only way to avoid these convention and nomination requirements is to relinquish party identification and to run as, or to submit, independent or write-in candidates. This alternative is inadequate protection for the right to political association. In *Williams* v. *Rhodes*, this Court concluded that these same requirements concerning a na-

tional convention were "substantial . . . burdens" for candidates for national office and for small political parties. 393 U.S. at 25 and n. 1. It follows, *a fortiori,* that these are also unduly onerous obstacles for candidates for state office. Thus, the court below correctly concluded that these requirements violate the First and Fourteenth Amendments.

B. Section 3513.11, which requires that a political party hold a massive state convention, is unconstitutional.

Section 3513.11 requires a political party to hold a state convention every other year. The convention which is contemplated is a massive affair, composed of the following three groups: (1) the party's candidates; (2) its various committees; and (3) 500 delegates apportioned among the counties of Ohio. For precisely the same reasons as discussed in the preceding sub-section of the *Argument,* this provision, too, denies the plaintiffs the equal protection of the laws, and violates their right to political association. And since, in *Williams* v. *Rhodes,* this Court already held that a party, whose candidate was seeking a national office, was not obligated to hold a national convention, by parity of reasoning, a party whose candidate is seeking state office can not be obligated to hold a state convention.

C. Sections 3513.02, 3517.03, and 3517.04, which require a political party to follow detailed procedures relating to its internal organization, are unconstitutional.

Provisions of the Ohio election laws require that all political parties have controlling committees which are to be elected by direct vote of the members (§3517.02) at the primary (§3517.03); that the controlling committees be composed in a certain fashion (§3517.03); and that the com-

mittees meet at a certain time after the primary (§3517.04). Like the provisions concerning national and state conventions, these provisions secure no paramount state interest, they are unduly burdensome, and they are unreasonable requirements.

These very same provisions were before this Court in *Williams* v. *Rhodes,* 393 U.S. at 25 n. 1, and have not been amended since. They were part of the restrictive network of laws condemned by that decision. In fact, the three-judge district court below found that these sections were declared unconstitutional in *Williams* v. *Rhodes,* and concluded that it is "unnecessary to decide or declare anything with respect to [their] unconstitutionality. . . ." (App. 51). The Court issued a permanent injunction against their enforcement (App. 69).

The defendants do not suggest any justification for these requirements (Brief at 40-41), nor can any be found. Instead, the defendants, at this late date, argue that "There was no evidence that the state was trying to enforce them" (Brief at 40). But, since the mandatory nature of these sections was clearly alleged and set out in the Complaint in No. 70-21 (Complaint para. 14(a), App. 10), and was admitted by the defendants (App. 18), it was not necessary to allege further that the statutes were being enforced.[6] Surely, this litigation, in effect already twice before this Court, should not be protracted further by the approach the defendants are now pressing.

In *Williams* v. *Rhodes,* this Court declared beyond any doubt that plaintiffs' challenge is properly lodged against the "totality" of Ohio election laws which deny them status

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[6] See note 2, *supra,* p. 12.

as a political party or proper access to the ballot, thereby unequally depriving them of critical First and Fourteenth Amendment rights. It is much too late in the day for the defendants to argue that plaintiffs must take on the Ohio election laws, step-and-law by step-and-law at a time. Indeed, the approach being proposed by the defendants could well place the plaintiffs in the position of never being able fully to vindicate their rights. *Williams* v. *Rhodes*, 393 U.S. at 27-28; *id.* at 63-66 (Warren, C.J., dissenting), where the plaintiffs were denied extraordinary relief because delays in litigation made such relief unduly burdensome on the state's administration of the 1968 election.

These provisions are properly before the Court and ripe for adjudication now. Cf. *Griswold* v. *Connecticut*, 381 U.S. 479. Because they seriously invade, without constitutional cause, the plaintiffs' First and Fourteenth Amendment rights, the order of the district court enjoining the defendants from enforcing these provisions should be affirmed.

III.

Section 3517.07 conditions political party access to the ballot on execution of a test oath without due process of law and unequally abridges plaintiffs' right to free speech and political association.

A. The oath requirement violates the First Amendment on its face.

By its terms, §3517.07 conditions party access to the ballot on the making of:

> an affidavit . . . under oath stating that it does not advocate, either directly or indirectly, the overthrow, by force or violence, of our local, state or national government; that it does not carry on any program of sedition or treason by radio, speech or press; that it has no connection with any foreign government or power; that it has no connection with any group or organization so connected, or so advocating, either directly or indirectly, the overthrow, by force or violence, of our local, state or national government or so carrying on a program of sedition or treason by radio, speech, or press . . .

In *Reynolds* v. *Sims*, 377 U.S. 533, 555, 562 (1964), this Court said that "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," and that "The right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . ."

Nowhere do those admonitions assume more concrete proportion than when a state presumes to require a politi-

cal party to disclaim stated beliefs as a condition of access to the ballot. Professor Thomas I. Emerson says "Qualifications for access to the ballot grounded upon conduct otherwise protected as expression would seem to present the clearest possible case for application of the full protection rule [of the First Amendment]. It is difficult to see how the social interest in internal security is served by exclusion of a political party from the political process. On the contrary, the danger to the state or nation would surely be enhanced by denying to any party or group the possibility of redressing their grievances through democratic procedures." *The System of Freedom of Expression* 202. See *Williams* v. *Rhodes, supra,* at 38-42 (Douglas and Harlan, JJ., separately concurring).

To deny access to the ballot to any party which advocates forceful overthrow, sedition or treason not only flies in the face of the First Amendment, *infra,* pp. 27-37, it is pragmatically unsound. Any political party which might advocate the use of force to seize power does so not because of its attachment to violence as such but as an instrument to achieve its political objectives. If it believes it can achieve those objectives through use of the electoral process, it is less likely to advocate, no less generate, violence. But the more such a party is shut out of a functioning parliamentary system, the more likely will it resort to force or to its advocacy.

Under our system of representative government, political parties can advocate any political objectives in which they believe. Likewise, the electorate should have the unhampered opportunity at the polls to cast their votes for the widest variety of political programs. At rock-bottom, the act of casting a ballot is perhaps the ultimate purpose behind the exercise of First Amendment rights. What good

is it to be able to express one's views as freely as possible if there is no ultimate opportunity to try to elect a government which shares those views? Thus, to close out any political party from the electoral process because some would describe its goals as seditious or treasonous, destroys the central function of the First Amendment. For that reason, oaths such as required by Sec. 3517.07 should be struck down on their face.

B. The oath requirement is overbroad.

The court below found this provision "overly broad on its face in that it attempts to prohibit mere advocacy" (App. 61). Nevertheless, it upheld the provision on the ground that "the Ohio Supreme Court, in *State ex rel. Beck* v. *Hummel,* 150 Ohio St. 127 (1948) construed the section narrowly" (App. 61). Specifically, the court below held that the section:

> narrowly construed to require an oath that (1) the party is not engaged in an attempt to overthrow the government by force or violence, (2) the party does not carry on a program of sedition or treason as defined by the criminal law and (3) the party is not knowingly associated with a group attempting to overthrow the government by force or violence, is constitutional (App. 62).

The decision below was incorrect and should be reversed. Despite the defendants' protestations to the contrary (Brief pp. 42-44), the Ohio test oath requirement is unconstitutional on its face. As the court below recognized, "Section 3517.07 is overly broad on its face in that it attempts to prohibit mere advocacy" (App. 61). *Accord,* e.g., *Keyishian*

v. *Board of Regents,* 385 U.S. 589, 599-600; *Brandenburg* v. *Ohio,* 395 U.S. 444, 447-448. It also is overbroad because it bars parties from the ballot because of political associations with foreign governments or "powers" or with organizations advocating violent overthrow, without regard to whether such association is knowing and with the specific intent to promote illegal goals. E.g., *Scales* v. *United States,* 367 U.S. 203, 229; *Elfbrandt* v. *Russell,* 384 U.S. 11, 15-17. (See App. 62, where the three-judge district court below failed to treat the constitutional requisite of specific intent, but limited the Ohio statute to "knowing" association.)

The court below concluded that these facial defects were cured by the Ohio Supreme Court's binding construction of §3517.07. *State ex rel. Beck* v. *Hummell,* 150 Ohio St. 127, 80 N.E.2d 899 (1948). It held that the Supreme Court of Ohio has recognized under this statute "a distinction between attempt and mere advocacy and limited the oath's proscriptive scope to the former" (App. 61).

The court below's determination that the Ohio statute has been narrowed by construction to a constitutional point is incorrect for two reasons.

First, even if the Ohio Supreme Court has so narrowed oath requirement, it still fails to pass constitutional muster. The oath cannot be wrenched from its authorizing statute. Contrary to the opinion of the court below, this Court's decision in *Gerende* v. *Board of Supervisors,* 341 U.S. 56 did not recognize "the constitutionality of an oath requirement for candidates for elective office, if the oath is limited to the assertion that the candidate is:

> not a person who is engaged in one way or another in the *attempt* to overthrow the government by *force*

or violence, and that he is not knowingly a member of an organization engaged in such an attempt. [Emphasis added.]" (App. 62.)

As this Court held in *Whitehill* v. *Elkins*, 389 U.S. 54, the Maryland statute was impermissibly broad and vague on its face, and as construed and applied. In *Gerende*, the Court had merely "accepted the narrowing construction tendered by the Attorney General during oral argument so as to avoid the constitutional issue that was argued." 389 U.S. at 58. Just as in the present case, "[t]hat construction had not yet been fashioned into an oath or certificate when Gerende reached us." 389 U.S. at 58. See Defendants' Brief pp. 42-44.

Second, in *State ex rel. Beck* v. *Hummell*, *supra*, the Supreme Court of Ohio was not distinguishing between an attempt at violent overthrow of government and mere advocacy of violent overthrow. It was making the easier and more gross distinction between an attempt at violent overthrow and advocacy of "an entire change in our form of government . . . " 150 Ohio St. at 137, 80 N.E.2d at 904.

That the Ohio court considered abstract advocacy of violent overthrow to be subsumed within the concept of "attempt," rather than within its concept of protected advocacy is revealed by its statement that, "it is a matter of common knowledge that there are Communists who do not wish to overthrow our government by force but who desire to accomplish the ends they have in view by constitutional methods." *Id.*, 80 N.E.2d at 905. The discussion of these "constitutional methods" makes it clear that the court was speaking (in 1948) of the constitutional amendment process, and that it did not consider advocacy

of violent overthrow to be a protected or constitutional method of effectuating "an entire change in our form of government . . . " And, to this day, the defendants, the state officers charged with enforcing the oath requirement, do not acknowledge that mere advocacy is protected activity for a political party. (Brief pp. 42-44.) *Compare Law Students Civil Rights Research Council* v. *Wadman,* 91 S. Ct. 720, 726-27.

C. The oath requirement is unduly vague.

The oath requirement is also unduly vague, and therefore violates due process of law. Stricter standards of permissible statutory vagueness are to be applied to any statute which has a potentially inhibiting effect upon rights guaranteed by the First Amendment of the United States Constitution. *Smith* v. *California,* 361 U.S. 147; *Cramp* v. *Board of Public Instruction,* 368 U.S. 278; *Baggett* v. *Bullitt,* 377 U.S. 360. The Ohio Statute is cluttered with vague language which requires its invalidation. For the reasons discussed above, no action of the Ohio Supreme Court has cured these defects.

The words "sedition or treason", for example, appear in the statute no less than four times. But the words are nowhere defined or explained. In *Keyishian* v. *Board of Regents,* 385 U.S. 589, 598, this Court found that

> dangers fatal to First Amendment freedoms inhere in the word "seditious". See *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 273-276. And the word "treasonable", if left undefined, is no less dangerously uncertain.

The statute, which is titled "Parties or groups engaged in un-American activities barred from ballot", denies a place on the ballot to any political party or group "which has in any manner any connection with any foreign government or power." What does this phrase mean? If an American political party espoused a program which in part was also being advanced by a foreign government, would that establish the necessary "connection"? In *Feinglass* v. *Reinecke,* 48 F. Supp. 438, 441 (N.D. Ill. 1942) the Court struck an election loyalty oath because of vagueness:

> The other tests prescribed by the statute for determining whether a party may have a place on the ballot also are so vague and indefinite as to make the Act invalid. Such terms as "un-American" and "the political principles of foreign nations" lack the precision required in a statute which affects the rights of a political group to appeal to the electorate. Any political idea that happens to conflict with the economic or political notions of an individual is apt by him to be deemed un-American.

The statute also denies a place on the ballot to any party "advocating, either directly or indirectly, the overthrow by force or violence of our government . . . " or having a "connection with any group or organization . . . so advocating, either directly or indirectly, the overthrow, by force or violence of our . . . government . . . " It is the functional equivalent of a Florida loyalty oath, less ambiguous, less prolix, and more limited in scope than the Ohio one challenged here, which was stricken by a unanimous court in *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278, because of its undue vagueness and uncertainty. Fatal ambiguity was found in the

Florida statutory requirement that state employees swear that they have never "knowingly lent their aid, support, advice, counsel, or influence to the Communist Party." 368 U.S. at 285. See also, e.g., *Baggett* v. *Bullitt*, 377 U.S. 360; *Whitehill* v. *Elkins*, 389 U.S. 54.

Further evidence of the Ohio statute's vagueness and overbreadth is its failure to deal on its face with the *knowledge* and *intent* of the putative new political party and its leaders who are supposed to sign the oath. What if the party has associations with another group engaged in forbidden advocacy which the party's leaders do not deem illegal or know nothing about? May they later be subject to perjury charges for having signed the oath? The danger is a real one, see *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-287, and even if the signer of the oath is ultimately vindicated, he faces embarrassing publicity at the hands of state officials who use the oath as a bludgeon to keep third parties off the ballot. See *State ex rel. Beck* v. *Hummel*, 150 Ohio St. 127, 80 N.E.2d 899 (1948) (Progressive Party denied place on ballot by Secretary of State because three of its leaders who signed loyalty oath affidavits were allegedly Communists; Secretary of State's publicized findings reversed by Ohio Supreme Court and Party's slate of presidential electors allowed on ballot). This system has been condemned. States cannot require political parties to sign an unduly vague oath at the risk of prosecution for perjury, particularly where the exercise of First Amendment freedoms may thereby be deterred. See, e.g., *Baggett* v. *Bullitt, supra; Whitehill* v. *Elkins, supra.*

D. The oath requirement violates substantive and procedural due process rights by placing the burden of proving loyalty on the political party rather than placing the burden of proving disloyalty on the state.

Even if Ohio's loyalty oath statute were not unconstitutional on free speech grounds or void for vagueness, it should still be invalidated because of its failure to meet other due process imperatives.

By the provisions of the law, the Secretary of State is authorized to investigate the facts appearing in the affidavit and to decide whether or not the party is entitled to a place on the ballot. The Secretary's decision is subject to appeal by any qualified member of the party.

The procedure bears a striking similarity to the one condemned in *Speiser* v. *Randall,* 357 U.S. 513. In *Speiser* a California law conditioned the granting of a special property-tax exemption for veterans upon the execution of a loyalty oath. The oath required was:

> I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in the event of hostilities.

The affidavit requirement was in furtherance of a California constitutional provision which forbade any tax exemption for anyone advocating overthrow of the government by force, violence, or other unlawful means. Under the statute the tax assessor had the duty to investigate the affidavit and determine its truthfulness. If the decision was adverse, review could be had under tax collection proceedings.

Thus, the procedural parallel is perfect. An affidavit is required by the citizen seeking the right or benefit. A state administrative official is given power to determine its validity; review may be had in the courts only following the adverse determination.

The Court in *Speiser* first noted the impact of the legislation in the area of Free Speech. (Surely this impact is increased when, as here, the freedom of association and the right to vote are joined.) The Court then said that for purposes of the opinion only, it would assume that California might deny tax exemptions to persons who engaged in the proscribed speech. Even assuming this, *the statute was held invalid because it placed the burden on the taxpayer* to show that he was entitled to the exemption. The Court explained that:

> Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.
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> How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? 357 U.S. at 526.
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> [W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program *due process demands that the speech is unencumbered until the State comes forward with sufficient proof to justify its inhibition.* (Emphasis added.) 357 U.S. at 528-9.

Under this holding the same result obtains here. The conclusion of the Supreme Court in *Speiser* is dispositive:

> Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure. 357 U.S. at 529.

The *Speiser* v. *Randall* doctrine is controlling here. The Ohio statute contravenes every due process tenet. The Secretary of State unilaterally decides that the new political party is not entitled to a ballot position. He holds no hearings. He does not permit cross-examination. And when the Secretary's decision is announced, it is the Party which must appeal and prove its loyalty. This illegal *ex parte* procedure (see *Carrol* v. *Princess Anne County*, 393 U.S. 175) was expressly approved by the Ohio Supreme Court in *State ex rel. Beck* v. *Hummel*, 150 Ohio St. 127, 80 N.E.2d 899, 905 (1948).

Recently this Court recognized the substantial constitutional burden with which a statute imposing such a procedure is freighted. *Law Students Civil Rights Research Counsel* v. *Wadmond*, 91 S. Ct. 720, 726-27. The Court's most recent decision on the merits in a loyalty oath case, concerned a Florida oath for public employees in the form: "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence." The oath was declared unconstitutional because it "falls within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." *Connell* v. *Higginbotham*, 91 S. Ct. 1772, 1773.

These principles are applicable to the present case. Cf. *Bond* v. *Floyd,* 385 U.S. 116. Thus the procedures validated by the Ohio Supreme Court are saturated with illegality and should be voided. See *Haskett* v. *Washington,* 294 F. Supp. 912, 916 (D.D.C. 1968) (concurring opinion); *Heckler* v. *Shepard,* 243 F. Supp. 841, 845 (D. Idaho 1965).

E. The oath requirement denies the equal protection of the laws by excepting the Democratic and Republican parties from its ambit.

Even if Section 3517.07, Ohio Revised Code, were not fatally defective for the several reasons discussed above, it would still run afoul of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The last paragraph of Section 3517.07, Ohio Revised Code, exempts from its requirements

> any political party or group which had had a place on the ballot in each national and gubernatorial election since the year 1900.

As abhorrent to constitutional standards as the oath requirement is per se, the exemption above renders it particularly infirm. The double standards favoring the Democratic and Republican political parties, so pervasive throughout the Ohio election code, are once again in evidence. The exemption of the two major parties is absolutely untenable and indefensible and creates a classification bearing no reasonable relationship to any legitimate legislative objective. If Ohio truly wishes to exclude by test oath all political parties which might be "subversive or treasonous," it should exempt none from the requirement. As Mr. Justice Stewart observed in *Jenness* v. *Fortson,* 29

L.Ed.2d 562 n. 25: "Time after time established political parties, at local, state, and national levels, have, while retaining their old labels, changed their ideological direction because of the influence and leadership of those with unorthodox or 'radical' views." The Ohio classification, therefore, is arbitrary, capricious and invidiously discriminatory against plaintiffs and other third parties.

One of the devices to restrict the right of suffrage that has been struck down is the so-called "grandfather clause." *Guinn* v. *United States,* 238 U.S. 347 (1915); *Lane* v. *Wilson,* 307 U.S. 268 (1939). Its resemblance to the exemption clause in Section 3517.07, Ohio Revised Code, is extraordinary. The grandfather clause was designed to limit the right to vote to those with the right paternity; the aim was to prevent Negroes from voting. The exemption clause in Section 3517.07, Ohio Revised Code is not even a sophisticated variation of this device. It is plainly and simply an attempt to deny the right to vote and the right to participate in the electoral process to political minority groups.

IV.

The petition requirements for inclusion of new or small parties and independent candidates on the ballot violate the First and Fourteenth Amendments.

A. Section 3517.01, governing political party access to the ballot, is unconstitutional.

Section 3517.01 creates two alternative routes for a group of voters to obtain recognition in Ohio as a political party. One way is for the group's candidate for governor, or its nominees for presidential electors, to poll at least 7% of

the entire vote cast for such office at the last preceding regular state election. If the group did not poll that number of votes at the last election, it must file petitions containing a number of signatures equal to seven per cent of the number of votes cast for governor or for presidential electors at the last previous election, in order to obtain recognition as a political party. The petitions must declare an intention to participate in the next primary, and must be filed 120 days before the primary. In other words, a group forming a new party, or the members of an established but small party, must file these petitions in the January preceding the November general election in which it desires to participate, and is obligated to hold a primary.

The Socialist Labor Party was unable to satisfy the requirement that it produce petitions with seven per cent of the vote cast in the 1968 election, or 277,179 valid signatures. It was denied a ballot position for the 1970 election until it secured an injunction from the court below. The fact that the Party has only a small number of supporters, at this time, was considered insufficient reason to keep it off the ballot. "[T]o grant the state power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year." *Williams* v. *Rhodes,* 393 U.S. at 32.

The validity of the seven per cent requirement cannot be assessed in isolation. Section 3517.01 is not the only barrier to new or small parties enacted by the Ohio legislature. It is just one strand of the entangling web of election laws designed to keep such parties off the Ohio ballot. The other requirements, concerning notably party primaries, conventions, nominating practices, size and organization, have

already been discussed in this brief. The interaction of these other requirements, with the seven per cent provision, distinguishes this case from *Jenness* v. *Fortson,* 29 L.Ed. 2d 554, upon which the defendants heavily rely.

In *Jenness,* this Court sharply distinguished the Georgia statutory scheme, which it validated, from the "totality" of Ohio laws which it invalidated in *Williams* v. *Rhodes.* The Georgia statute enabled an independent candidate, or a nominee of a "political body," to get his name on the ballot only if he has filed a nominating petition signed by 5% of the registered voters. But unlike the Ohio election law, the Georgia requirement constituted the only significant impediment to inclusion on the ballot. This distinction proved persuasive to this Court.

It may be true, as the defendants argue, that 5% of the registered voters is the numerical equivalent of 7% of the votes cast. And it may also be true that, after the decision in *Williams* v. *Rhodes,* Ohio changed its election laws somewhat. But the changes have not been significant. The disparity between Ohio's present election laws, and those of Georgia, remains substantial. First, Georgia provides for unfettered write-in votes, but Ohio does not. See *Jenness* v. *Fortson,* 29 L.Ed.2d at 560. Ohio now permits write-in votes, but a would-be-write-in candidate must file a declaration of intent 20 days prior to the election, and he must pay a filing fee (§3513.041). Second, at the same time Ohio reduced the petition requirement from 15% to 7%, it increased the deadline for filing the petition from ninety days before an election to one hundred and twenty days before the next primary election (§3517.01). Ohio's prior existing early deadline was already constitutionally suspect. *Jenness* v. *Fortson,* 29 L.ed.2d at 560. On the

constitutional infirmity of the present January deadline for the following November general election, see *Beller* v. *Adams,* 235 So.2d 502 (Fla. 1970). Third, unlike Georgia, Ohio still imposes "upon a small party or upon a new party the Procrustean requirement of establishing elaborate election machinery." *Jenness* v. *Fortson,* 29 L.ed.2d at 560. Fourth, except by court order, no third party candidate or independent candidate has been included on an Ohio ballot since 1952, when the present Ohio legislative scheme was completed. By sharp contrast, "The open quality of the Georgia system is far from theoretical. For the stipulation of facts in this record informs us that a candidate for governor in 1966 and a candidate for President in 1968, gained ballot designation by nominating petitions, and each went on to win a plurality of the votes cast at the general election." *Jenness* v. *Fortson,* 29 L.ed.2d at 561 (footnotes omitted).

At this point in time, even if the rest of the entangling web of restrictive Ohio election laws were swept away, the 7% requirement would still be invalid—despite the Court's decision in *Jenness.* The reasons for Ohio's high petition requirement, rather than being legitimate and subordinating, are constitutionally invalid. Quite clearly, Ohio first erected an apparently unprecedented 15% signature requirement and then reduced it, under goad by this Court, relatively so little, in order to secure ballot monopoly of the Democratic and Republican parties. *Williams* v. *Rhodes,* 393 U.S. at 32; *id.* at 41 n. 9 (Harlan, J., concurring). In the light of the history of Ohio's laws, it can hardly be argued today that Ohio still needs one of the nation's highest petition requirements to secure any legitimate interests it can now ascribe.

Under Ohio law prior to 1948, an independent candidate could gain a place on the ballot by producing signatures of one per cent of the number of votes cast at the prior gubernatorial election. Yet since 1901, only once have there even been as many as seven parties on the ballot. 393 U.S. at 47 n. 9 (Harlan, J., concurring). The experience in the other states is similar. Thus, forty-two of Ohio's sister states find their interests satisfactorily served by requirements of one per cent or less. 393 U.S. at 33 n. 9; *id.* at 47 n. 10 (Harlan, J., concurring). As summarized by Mr. Justice Black in his opinion for the Court in *Williams*: "[T]he experience of many states, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties' attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required." 393 U.S. at 33 (footnote omitted).

On the other hand, Ohio has had experience with a seven per cent requirement. In 1952, the state legislature raised the requirement for independent candidates to seven per cent from one per cent. Since that date, with the exception of the two occasions when courts have ordered the state to place candidates on the ballot, there has not been a single independent or third party candidate on the Ohio ballot. This evidence strongly suggests that a 7% requirement is undue and unnecessarily harsh upon third parties; the state's legitimate interests can adequately be served by a lesser requirement. The decision of the court below voiding the 7% signature requirement should be affirmed. The order should, however, be extended to preclude the defendants from enforcing any signature requirement more onerous than that which was imposed in Ohio up

to and including the 1948 presidential election. Indeed, in the light of Ohio's recent history of restrictive election practices, it would be appropriate to enjoin the defendants from enforcing any signature requirement more onerous than the least restrictive requirement imposed by any of the other United States. See Record in No. 70-21, Appendix D to Memorandum in Support of Motion for Summary Judgment.

B. Sections 3513.257 and 3513.258, governing independent candidate access to the ballot is unconstitutional.

Sections 3513.257 and 3513.258 require independent candidates for state or federal office to submit petitions signed by not less than 4% of the entire vote cast for governor or presidential electors at the last preceding regular state election. (Sections 3513.252 and 3513.256 require independent candidates for local office to submit petitions signed by not less than 4% of whichever is the greater vote cast for governor or presidential electors in the political subdivision for which they seek office.) Prior to this Court's decision in *Williams* v. *Rhodes,* the Ohio election laws required petitions containing the signatures of 7% of the vote cast for governor in the last preceding regular election. Even as amended, these provisions are subject to the same constitutional infirmity as §3517.01 which applies to political parties.

The decisions of this Court since *Williams* v. *Rhodes* do not mandate reversal in this case. *Jenness* v. *Fortson,* 29 L.Ed.2d 554 upheld a requirement that independent candidates produce petitions signed by 5% of the registered voters. But the 5% requirement was the only hurdle that an independent candidate had to clear in order to get on

the ballot. Similarly, in *Jackson* v. *Ogilvie,* 325 F. Supp. 864 (N.D. Ill. 1971), *aff'd without opinion,* 29 L.Ed.2d 705, the 5% requirement was the only relevant requirement an independent candidate had to comply with, and the deadline was merely 64 days prior to the general election. 325 F. Supp. at 869.[7]

In Ohio, on the other hand, there are additional onerous burdens. Many of these have been surveyed in the argument in this Brief concerning small and new party access to the ballot. Several of the burdens pertain directly to the situation of independent candidates. First, Ohio now provides for write-in votes. But the right is limited. A would-be write-in candidate must file a declaration of intent 20 days prior to the election, and he must pay a filing fee (§3513.041). Second, at least 200 signatures for an independent candidate for state-wide office must be collected from each of thirty counties, and no more than one-fourth of the total signatures required may be obtained from residents of one county (§3513.258). (The unconstitutionality of this provision is taken, *infra,* pp. 45-48.) Third, independent candidates in Ohio, unlike those in Georgia or Illinois have an "unreasonably early filing deadline" (*Jenness* v. *Fortson,* 29 L.Ed.2d at 560), which requires that the petitions be filed "not later than 4:00 P.M. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general

[7] The other case relied upon by the defendants, *Beller* v. *Adams,* 235 So. 2d 502 (Fla. 1970), did not involve an independent candidate, but rather the candidate of a small political party. Moreover, although the court in that case upheld a five per cent requirement, it struck down a restrictive deadline requirement. It was, in effect, a decision upholding a per cent requirement in isolation. See also, *Beller* v. *Kirk,* 328 F. Supp. 485 (S.D. Fla. 1970), *aff'd without opinion, sub nom. Beller* v. *Askew,* 29 L.Ed.2d 705.

election" (§§3513.192, 3513.356, 3513.257, and 3513.258). In other words, an independent candidate desirous of running in the November, 1970, election was required to file his petition in February.[8]

Given the "totality" of the Ohio election laws now before this Court, and the Ohio history, the court below clearly was correct in finding that:

> "[T]he state has shown no compelling state interest in raising the [pre-1952] one percent requirement to seven percent or to the present four percent, nor has it demonstrated a compelling reason for the four percent requirement" (App. 66).

The decision enjoining the 4% requirement should be affirmed. The order, however, should be extended in the same fashion the order concerning the political party signature requirement should be extended. See pp. 41-42, *supra*.

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[8] The filing deadline was upheld by the court below (App. 67-68). The Jurisdictional Statement which specifically raises this issue has not been acted upon by the Court. *Sweetenham* v. *Rhodes*, jurisdictional statement filed, Oct. 2, 1970, 39 U.S.L.W. 3151 (No. 70-15, 1971 Term).

V.

The requirements of Section 3513.258, that an independent candidate for state-wide office file petitions containing signatures of two hundred electors from each of thirty counties and that no more than one-fourth of the total signatures required to be obtained by an independent candidate be obtained from one county, deny equal protection of the laws.

Section 3513.258 requires that independent candidates for state-wide office file a nominating petition containing a specified number of signatures. In addition, the statute requires that at least 200 of these signatures be obtained from each of thirty counties, and that no more than one-fourth of the total signatures required be obtained from one county. But, "Ohio has eighty-eight counties. In the 1960 census Ohio had a total population of 9,705,336 persons. Over two-thirds of Ohio's population lives in the sixteen largest counties. Over fifty percent of Ohio's population lives in the seven largest counties." (App. 63, opinion of the court below.)

Because of the unequal distribution of population among Ohio's counties, these requirements deny equal protection of the laws. First, as the court below noted, "Under Section 3513.258 the fifty percent of Ohio's qualified voters living in its seven largest counties are disabled from nominating independent candidates for statewide office". (App. 63). Second, the total number of voters in the least populous forty-nine counties have the "*same* absolute veto power" as the much larger total number of voters in the most populous forty-nine counties. *Socialist Workers Party* v. *Rockefeller,* 314 F. Supp. 984, 991 (S.D.N.Y. 1970), *aff'd,* 400 U.S. 806.

Moore v. *Ogilvie*, 394 U.S. 814 is directly in point. There the Court held that a similar Illinois statute violated the Equal Protection clause. The Illinois statute required signatures of at least 200 qualified voters from each of 50 counties. The Court found that 49 counties contained 93.4% of the state's voters; yet those voters could not themselves nominate a candidate unless he also collected 200 signatures from another county.

In the case at bar, the 29 most populous counties—one less than the number required to get on the ballot—contain 79.4% of the population of the state.[9] Yet they cannot nominate an independent candidate for statewide office, since signatures from 30 counties are required. Surely, the constitutional infirmity that inheres in the unequal voting

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[9] The population of Ohio's 29 most populous counties, as of April 1, 1970, is as follows:

1.	Cuyahoga	1,701,640
2.	Hamilton	915,370
3.	Franklin	822,336
4.	Montgomery	599,996
5.	Summit	550,234
6.	Lucas	478,966
7.	Stark	368,756
8.	Mahoning	301,513
9.	Lorain	255,612
10.	Trumbull	231,567
11.	Butler	218,201
12.	Lake	196,126
13.	Clark	153,197
14.	Richland	129,162
15.	Greene	124,285
16.	Portage	123,251
17.	Allen	110,849
18.	Columbiana	107,435
19.	Licking	106,547
20.	Ashtabula	97,318
21.	Jefferson	95,121
22.	Clermont	94,730

power of citizens of different counties cannot turn on the difference between a disenfranchised majority of 93.4% (Illinois) and a disenfranchised majority of 79.4% (Ohio). Nor can it turn, as the defendants suggest, on the percentage of counties from which signatures are required (Brief p. 47). In both Illinois and Ohio, the discrimination against residents of the more populous counties is considerable. *Socialist Workers Party* v. *Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970), *aff'd*, 400 U.S. 806, involved the New York statute which required fifty signatures from each county. That law was said to be "constitutionally indistinguishable" from the statute involved in *Moore*. 314 F. Supp. at 991. *Socialist Workers Party* v. *Hafe*, 304 F. Supp. 534 (E.D. Mich. 1969) invalidated a statute requiring at least 100 signatures from each of 10 counties.

The defendants also attempt to justify the imbalance by arguing that: "A state-wide candidate should not only know the problems and needs of the citizens in all counties of the State, but some representative number of voters from at least a significant geographical, as well as numerical portion of the state should be backing him in his solutions, programs and ideas" (Brief at 46). This argument was laid to rest by the Court in *Moore* v. *Ogilvie*:

23.	Wood	88,864
24.	Wayne	86,592
25.	Warren	85,025
26.	Miami	83,113
27.	Medina	82,883
28.	Belmont	80,072
29.	Scioto	77,082
	TOTAL	8,365,843

The state's population as of that date was 10,542,030. See Boston Herald Traveler, The 1971 World Almanac 455-56 (1970).

> It is no answer to the argument that under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government. 394 U.S. at 818-19.

The Ohio requirement that no more than one-fourth of the signatures required come from one county, also unconstitutionally dilutes the rights of voters in the more populous counties. As the court below declared, "There is no compelling state interest in limiting the number of qualified voters who may sign a candidate's petition" (App. 65). This requirement too is an unlawful divergence from the constitutional standard of one man one vote.

CONCLUSION

For the above reasons, Court should affirm so much of the judgment of the court below as favored their position and reverse so much of the judgment of the court below as denied them complete relief.

Respectfully submitted,

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SOCIALIST LABOR PARTY ET AL. v. GILLIGAN, GOVERNOR OF OHIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

No. 70-21. Argued March 23, 1972—Decided May 30, 1972

Appellant political party, its officers, and members, attacked the constitutionality of revisions of the Ohio election code made following this Court's decision in *Socialist Labor Party* v. *Rhodes*, 393 U. S. 23, and a provision that a political party execute a loyalty affidavit under oath in order to obtain a ballot position. The District Court, deciding the case on cross-motions for summary judgment on the basis of the pleadings and supporting affidavits, upheld all appellants' challenges except that involving the oath provision. All parties appealed. A revision of the election code made after this Court noted probable jurisdiction mooted all but the oath issue. Appellants, who did not attack the oath provision in *Rhodes* and who have been on the ballot and presumably have complied with that provision since its adoption in 1941, contend that it violates the First Amendment, is impermissibly vague, does not comport with due process, and, since it applies to them and not the two major political parties, violates equal protection. *Held:* The record and pleadings on the one issue not mooted by the supervening legislation (an issue that received scant attention in appellants' complaint and none in the affidavits supporting the cross-motions for summary judgment) are inadequate for resolution of the constitutional questions presented, and in view of the abstract and speculative posture of the case the appeal must therefore be dismissed. *Rescue Army* v. *Municipal Court*, 331 U. S. 549. Pp. 585–589.

318 F. Supp. 1262, appeal dismissed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 589.

Sanford Jay Rosen argued the cause for appellants. With him on the brief were *Melvin L. Wulf*, *Benjamin Sheerer*, and *Jerry Gordon*.

Donald J. Guittar, Assistant Attorney General of Ohio, argued the cause for appellees. With him on the brief were *William J. Brown,* Attorney General, and *Harold C. Heiss.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellant Socialist Labor Party has engaged in a prolonged legal battle to invalidate various Ohio laws restricting minority party access to the ballot. Concluding that "the totality of the Ohio restrictive laws taken as a whole" violated the Equal Protection Clause of the Fourteenth Amendment, this Court struck down those laws in *Socialist Labor Party* v. *Rhodes,* 393 U. S. 23, 34 (1968).[1] Following that decision the Ohio Legislature revised the state election code, but the Party was dissatisfied with the revisions and instituted the present suit in 1970.

The Socialist Labor Party, its officers, and members joined as plaintiffs in requesting a three-judge District Court to invalidate on constitutional grounds various sections of the revised election laws of Ohio. The plaintiffs specifically challenged provisions of the Ohio election laws requiring that a party either receive a certain percentage of the vote cast in the last preceding election or else file petitions of qualified electors corresponding to the same percentage; provisions relating to the organizational structure of a party; provisions requiring that a political party elect a specified number of delegates and alternates to a state convention; and provisions requiring a party to be part of a national political party that holds national conventions at which delegates elected in state primaries nominate presidential and vice-

[1] That case was decided together with *Williams* v. *Rhodes,* 393 U. S. 23 (1968).

presidential candidates. In addition, they challenged that part of the Ohio election code requiring a political party to file an affidavit under oath stating in substance that the party is not engaged in an attempt to overthrow the government by force or violence, is not associated with a group making such an attempt, and does not carry on a program of sedition or treason as defined by the criminal law.

The case was decided on cross-motions for summary judgment, the three-judge District Court having before it the complaint and answer of the respective parties, and affidavits filed pursuant to Fed. Rule Civ. Proc. 56. The court ruled on the merits in favor of all of appellants' constitutional challenges to the Ohio election laws except that involving the oath requirement, with respect to which it ruled in favor of the appellees. Both sides appealed to this Court, and we noted probable jurisdiction. 401 U. S. 991 (1971).

Since then, the posture of this litigation has undergone a significant change. On December 23, 1971, the Ohio Legislature enacted Senate Bill No. 460, which embodied an extensive revision of the state election code. Both sides now agree that the passage of this act renders moot all but one of the issues decided below. The one challenged provision that remains unamended is the state's requirement that a political party execute the above-described affidavit under oath in order to obtain a position on the ballot.

Appellants' 1970 complaint represented a broadside attack against interrelated and allegedly overly restrictive provisions of the Ohio election laws. The three-judge District Court, in its ruling for the appellants on the issues that have now become moot, stated:

> "The 1969 amendments to the election laws merely perpetuate the restrictive laws enacted between 1948 and 1952. The overall effect of these laws

is still to deny to plaintiffs their constitutional right of political association." 318 F. Supp. 1262, 1269–1270 (footnote omitted).

Thus appellants, at the time they filed their 1970 action, were fenced out of the political process by a series of restrictive provisions that prevented them from making any progress toward a position on the ballot as a designated political party. Their challenge was necessarily of a somewhat abstract character, since under their allegations they were able to comply with very few of the provisions regulating access to the ballot. Now, however, with the enactment of a revised election code, the abstract character of the single remaining challenge to the Ohio election procedures stands out all the more.

Appellants did not in their action that came here in 1968 challenge the loyalty oath. Their 1970 complaint respecting the loyalty oath is singularly sparse in its factual allegations. There is no suggestion in it that the Socialist Labor Party has ever refused in the past, or will now refuse, to sign the required oath. There is no allegation of injury that the party has suffered or will suffer because of the existence of the oath requirement.

It is fairly inferable that the absence of such allegations is not merely an oversight in the drafting of a pleading. The requirement of the affidavit under oath was enacted in 1941, 119 Ohio Laws 586, and has remained continuously in force since that date. The Socialist Labor Party has appeared on the state ballot since the law's passage, and, unless the state officials have ignored what appear to be mandatory oath provisions, it is reasonable to conclude that the party has in the past executed the required affidavit.

It is axiomatic that the federal courts do not decide abstract questions posed by parties who lack "a personal stake in the outcome of the controversy." *Baker* v.

Carr, 369 U. S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U. S. 83, 101 (1968). Appellants argue that the affidavit requirement violates the First and Fourteenth Amendments, but their pleadings fail to allege that the requirement has in any way affected their speech or conduct, or that executing the oath would impair the exercise of any right that they have as a political party or as members of a political party. They contend that to require it of them but not of the two major political parties denies them equal protection, but they do not allege any particulars that make the requirement other than a hypothetical burden. Finally, they claim that the required affidavit is impermissibly vague and that its enforcement procedures do not comport with due process. But the record before the three-judge District Court, and now before this Court, is extraordinarily skimpy in the sort of proved or admitted facts that would enable us to adjudicate this claim. Since appellants have previously secured a position on the ballot with no untoward consequences, the gravamen of their claim that it injures them remains quite unclear.

In the usual case in which this Court has passed on the validity of similar oath provisions, the party challenging constitutionality was either unable or unwilling to execute the required oath and, in the circumstances of the particular case, sustained, or faced the immediate prospect of sustaining, some direct injury as a result of the penalty provisions associated with the oath. See, *e. g.*, *Cole* v. *Richardson*, 405 U. S. 676 (1972); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952).

In *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 283–285 (1961), the appellants were public school teachers who had been threatened with discharge for their refusal to execute the required oath. The Court held that even though appellants might be able to sign the